

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[illegible]

**AFFIDAVIT OF WAYNE RANDALL IN SUPPORT OF
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

STATE OF OHIO)
 : ss.:
COUNTY OF HAMILTON)

Wayne Randall, being duly sworn, deposes and says as follows:

BACKGROUND

1. I am a Vice President, Brand Franchise Leader for our Global Oral Care business at The Procter & Gamble Company (“P&G”). In this capacity, I am responsible for the overall sales and profit of the Global Oral Care business, for leading our global innovation program, our global marketing programs and our global packaging work.

2. I joined P&G in 1981 after completing a BS in Economics at Southern Methodist University and an MBA at Harvard Business School. I first joined P&G in the marketing department and worked on such brands as Zest Bar Soap, Downy Fabric Softener, Comet Cleanser, Mr. Clean and Charmin Bathroom Tissue. In 1992, I moved to Portugal and became the Marketing Director for that country and was responsible for all brands that P&G

marketed in Portugal. In 1994, I became the Marketing Director for the tissue and towel business that P&G had just acquired in Western Europe. In 1996, I was promoted to Managing Director. In 1999, I was promoted to Vice President and held that role in the Family Care business (tissue/towel) until October 2006.

3. From October 2006 to January 2007, I led an initiative implementing structural changes in the P&G Global Oral Care business. On January 1, 2007, I assumed my responsibilities as Vice President, Brand Franchise Leader for our Global Oral Care business at P&G.

4. I submit this affidavit in support of P&G's Motion for a Preliminary Injunction.

THE POWER TOOTHBRUSH MARKET

5. Traditionally, there have been two primary competitors in the premium power toothbrush market in the United States: Oral-B (distributed by P&G) and Philips. Oral-B makes a variety of power toothbrushes, including battery-operated models and rechargeable rotating-oscillating power toothbrushes. Philips manufactures and distributes the power Sonicare® toothbrushes.

6. For the year ending August 2007, the rechargeable power toothbrush market was \$111.6 million in all retail outlets in the United States. Of this market, premium power toothbrushes, those priced over \$60, accounted for \$79.8 million of these sales, representing 71.5% of the market. Philips holds a 61.2% dollar share of this premium power toothbrush market, and Oral-B holds a 38.2% dollar share.

7. Recently, a new player has entered the premium power toothbrush market: Ultreo. The Ultreo toothbrush is a power toothbrush with bristles that move at sonic speeds.

The Ultreo toothbrush is uniquely positioned as a brush that projects ultrasonic energy from the toothbrush head.

ULTREO'S MARKETING AND RETAIL STRATEGY

8. Ultreo is marketed and distributed by Ultreo, Inc. Currently, Ultreo is available for sale through internet retailers, such as Amazon.com and Drugstore.com, and recently became available in the late Autumn Frontgate catalogue. Upon information and belief, Ultreo will be available in high-end retail outlets, including Sharper Image and Brookstone, by the middle of October. The Ultreo toothbrush was originally being offered for sale for \$149.00. Ultreo has already raised the price of the toothbrush to \$169.00. A true and correct copy of articles discussing Ultreo's retail plans are attached. One is entitled "Ultreo, Inc. Granted U.S. Patent for Ultrasonic Toothbrush Employing an Acoustic Waveguide" and found at www.genengnews.com is attached as Exhibit A. Another is entitled "Redmond's Ultreo prepares launch of ultrasound toothbrush," which was found in The Seattle Times on May 3, 2007 and is attached as Exhibit B.

9. As detailed in these articles and in other public statements, Ultreo has outlined its plans. According to the President and Chief Executive Officer of Ultreo, Jack Gallagher, Ultreo is the first major innovation in power toothbrushes in fifteen years. Mr. Gallagher was formerly the president of Optiva Corporation, which developed the Sonicare® toothbrush. The Sonicare® toothbrush was first introduced in 1992 and now it holds a 61.2% dollar share of the premium power toothbrush market. Mr. Gallagher's short-term goal is for Ultreo to corner 10% of the power toothbrush market, which, according to Mr. Gallagher, is worth \$100 million.

10. Historically in this market we have seen that a new product advertised with dramatic performance claims can grab the attention of dental professionals and consumers and can quickly capture a large market share.

11. Ultreo has run several versions of its print advertisements. In its first print advertisement, Ultreo claims:

The difference is Ultrasound. Ultreo takes power brushing where it's never gone before with a groundbreaking combination of ultrasound waveguide technology and precisely tuned sonic bristle action. Ultreo's bristles create bubbles that are powerfully activated by nearly 4 million cycles of ultrasound energy channeled by a proprietary ultrasound waveguide. As these bubbles expand and contract, they are able to remove plaque bacteria. Ultreo – a safe, yet powerful cleaning combination of ultrasound-activated pulsating bubbles and sonic bristle action for a gentle, deep, long lasting feeling of clean.

This advertisement also claims: "Ultreo's combination of ultrasound waveguide technology and sonic-bristle action can remove hard-to-reach plaque bacteria that bristle action alone can leave behind." A true and correct copy of this Ultreo print advertisement, which we refer to as "Version A," is attached as Exhibit C.

12. Copies of Ultreo's "Version A" advertisement appeared in the following magazines and journals:

- Dental Economics, May and June 2007 issues
- Dental Products Report, April, May and June 2007 issues
- RDH, May and June 2007 issues
- DentalTown, April, May and June 2007 issues
- Dimensions of Dental Hygiene, April, May and June 2007 issues
- Inside Dentistry, July/August 2007 issue

- HygieneTown, April, May and June 2007 issues
- Modern Hygienist, April, May and June 2007 issues

13. Ultreo also has a two-page print advertisement that uses the first page from its “Version A” advertisement and adds a second page that makes the following statements:

- “Your patients trust your recommendations.”
- “A Deep Clean: Ultreo’s combination of ultrasound waveguide technology and sonic-bristle action can remove hard-to-reach plaque bacteria that bristle action alone can leave behind.”
- “A Fast Clean: Ultreo has been clinically proven to remove up to 95% of plaque from hard-to-reach areas in the first minute of brushing.”

This two-page print advertisement appeared in the April 2007 issue of Dental Economics and the April 2007 issue of RDH. A true and correct copy of this two-page Ultreo print advertisement is attached as Exhibit D.

14. In July 2007, Ultreo revised its original print advertisement to make the following claims:

- “The difference is Ultrasound.”
- “Ultreo takes power brushing where it’s never gone before.”
- “Ultreo is the first power toothbrush to combine ultrasound waveguide technology with precisely tuned sonic bristle action.”
- “Ultreo’s bristles create microbubbles that are powerfully activated by nearly 4 million cycles of ultrasound energy channeled by a proprietary ultrasound waveguide.”
- “As shown in laboratory studies, as these microbubbles expand and contract, they can remove plaque bacteria. The result is an incredible, long-lasting feeling of clean.”
- “Ultreo – a safe, yet powerful cleaning combination of ultrasound-activated pulsating bubbles and sonic bristle action for a gentle, deep, long-lasting feeling of clean.”

Ultreo also claims in this same advertisement that: “Ultreo’s combination of ultrasound waveguide technology and sonic bristle action can remove hard-to-reach plaque bacteria that bristle action can leave behind.” A star follows that claim and references a disclosure found at the bottom of the page in very small print, which reads: “As shown in laboratory studies conducted at a leading research university.” The advertisement continues to explain the cleaning effect of these “ultrasonic bubbles:” “Bubbles are activated by the ultrasound and transformed into pulsating bubbles that can remove plaque bacteria, as shown in laboratory studies.” Ultreo has run a number of slight variations of this advertisement, which we collectively refer to as “Version B.” Six variations of the “Version B” advertisement are attached as Exhibit E.

15. Copies of Ultreo’s “Version B” advertisement appeared in the following magazines and journals:

- Dental Economics, July and August 2007 issues
- Dental Products Report, July, August and September 2007 issues
- RDH, July, August and September 2007 issues
- DentalTown, July, August and September 2007 issues
- Dimensions of Dental Hygiene, July and August 2007 issues
- HygieneTown, July/August and September 2007 issues
- Modern Hygienist, July, August and September 2007 issues
- Women Dentist Journal, July and September 2007 issues

16. Similar claims were made in advertisements promoting Ultreo’s presence at the recent American Dental Association convention. In that print advertisement, Ultreo claims:

Invented at the University of Washington, Ultreo takes power brushing where it’s never gone before with a groundbreaking

combination of ultrasound waveguide technology and precisely tuned sonic bristle action. Ultreo's bristles create microbubbles that are powerfully activated by nearly 4 million cycles of ultrasound energy per brushing channeled by a proprietary ultrasound waveguide. The result is an incredible, long-lasting feeling of clean.

The advertisement also contains the claim that Ultreo is: "[c]linically proven to remove up to 95% of hard-to-reach plaque in the first minute of brushing..." The advertisement also notes that, "In a recent study, 80% of people who use Ultreo for 30 days would switch to Ultreo from the power toothbrush they were using before." This advertisement was found in the September 2007 issue of RDH. A true and correct copy of this convention print advertisement is attached as Exhibit F.

17. In addition to print advertisements, Ultreo has sponsored the publication of articles in various trade publications, which make similar claims. For example, in the May 2007 issue of HygieneTown magazine, the following description is found:

Ultreo is the newest and most innovative power toothbrush available. It combines ultrasound waveguide technology with sonic bristle action for a deep, long-lasting feeling of clean. Ultreo's sonic action bristles create bubbles and clean on contact, while the ultrasound waveguide channels ultrasound energy from the transducer in the back of the brush head directly into the bubbles. The bubbles are activated by the ultrasound and transformed into pulsating bubbles that can remove plaque bacteria. It really is very exciting technology.

A true and correct copy of this article is attached as Exhibit G.

18. The package of the Ultreo product also contains a number of similar claims. A true and correct copy of the package is attached as Exhibit H. Among the claims found on the package are:

- "Sonic action bristles with power tip creates bubbles and cleans away plaque upon contact."

- “The difference is Ultrasound. Ultreo™ is the first power toothbrush to combine the forces of ultrasound waveguide technology with precisely tuned sonic bristle action. Ultreo’s bristles create bubbles that are powerfully activated by nearly 4 million cycles per brushing of ultrasound energy channeled by a proprietary ultrasound waveguide.”
- “Ultreo—a safe, yet powerful cleaning combination of ultrasound-activated pulsating bubbles and sonic bristle action for a gentle, deep, long-lasting feeling of clean.”
- “Bubbles are activated by the ultrasound and transformed into pulsating bubbles for an incredible feeling of clean.”¹
- “A deep clean. Ultreo’s combination of ultrasound waveguide technology and sonic bristle action can remove hard-to-reach plaque for an incredibly deep feeling of clean.”
- “8 out of 10 people who used Ultreo in a recent study would switch to Ultreo from their current power toothbrush.”

19. Additionally, Ultreo is making a number of claims on its website, found at www.ultreo.com. A true and correct copy of certain pages from the Ultreo website (as of October 4, 2007) are attached as Exhibit J. Among the claims being made on the website are the following:

- “Sonic action bristles with power tip clean away plaque upon contact and create microbubbles.”²

¹ Ultreo has changed its packaging. The prior version of the Ultreo package made the following claims: “Bubbles are activated by the ultrasound and transformed into pulsating bubbles that can remove plaque bacteria.” and “A deep clean. Ultreo’s combination of ultrasound waveguide technology and sonic bristle action can remove hard-to-reach plaque bacteria that bristle action alone can leave behind.” A true and correct copy of the earlier version of the Ultreo package is attached as Exhibit I.

² Ultreo recently changed its website. The prior version of the website made the following claims: “Sonic action bristles with power tip creates microbubbles and cleans away plaque upon contact” and “Sonic action bristles with power tip creates bubbles and cleans away plaque upon contact.” True and correct copies of earlier versions of the Ultreo website, dated July 11, 2007 and September 10, 2007, are attached as Exhibits K & L, respectively. These claims are very similar to the claim still found on the Ultreo packaging.

- “Ultreo takes power brushing where it’s never gone before.”
- “Ultreo is the first power toothbrush to combine patented waveguide technology with precisely tuned sonic bristle action. Ultreo’s bristles create microbubbles that are powerfully activated by nearly 4 million cycles of ultrasound energy per brushing channeled by a patented ultrasound waveguide.”
- “Ultreo’s combination of patented ultrasound waveguide technology and sonic bristle action can remove hard-to-reach plaque for an incredibly deep feeling of clean.”
- “Ultreo has been clinically proven to remove up to 95% of plaque from hard-to-reach areas in the first minute of brushing.”

20. In addition, the Ultreo owner’s manual included in the Ultreo package and available on the Ultreo website contains a letter to consumers from the Ultreo Chief Executive Officer and President, Jack Gallagher. In his letter, Mr. Gallagher refers to the ultrasound waveguide as “magic.” He describes the ultrasound waveguide and then informs consumers that: “This is where the magic happens.” A true and correct copy of the Ultreo’s owners manual, as downloaded from the Ultreo website on October 4, 2007, is attached as Exhibit M.

21. We are now starting to see Ultreo advertising in consumer catalogs and making similar claims. For example, in the Late Autumn 2007 catalog for Frontgate, Ultreo is profiled on an entire page. The advertisement states: “Latest technology achieves a new level of clean and white within the first minute of brushing.” The advertisement claims that:

Independent research studies have proven that:

- Ultrasound waveguide technology in combination with precisely tuned sonic bristle action is significantly more effective at removing bacteria.
- In the first minute of brushing, Ultreo removes up to 95% of hard-to-reach plaque
- Ultreo is effective at removing coffee, tea, and other extrinsic stains for naturally whiter teeth in just 14 days.

The advertisement also contains a bar graph that purports to show the removal of plaque without bristle contact from a laboratory study. A true and correct copy of this advertisement is attached as Exhibit N.

22. Additionally, in the Holiday 2007 edition of the SkyMall catalog that is available on numerous airlines, Ultreo is advertised for sale. In a catalog distributed on Southwest Airlines, the advertisement for Ultreo makes the following claim: "The sonic bristles create bubbles that pulsate at an exact ultrasonic frequency for optimal plaque removal." A true and correct copy of this advertisement is attached as Exhibit O.

P&G WILL LIKELY BE HARMED AS A RESULT OF ULTREO'S FALSE CLAIMS

23. P&G regularly tracks market data to assess how the introduction of new products will impact on its sales of its existing products with the assistance of Coulter-Renken. P&G asked Coulter-Renken to analyze the potential impact of the launch of the Ultreo toothbrush on the sales of existing P&G toothbrushes and those manufactured by Philips. Coulter-Renken had collected the necessary data by asking over three thousand consumers to state their preferences between various toothbrushes. In an internet survey, consumers were presented with a number of images of two toothbrushes and asked, "Which toothbrush would you be more likely to purchase for yourself?" The consumer could select one of the two toothbrushes or "purchase none." According to this analysis, Ultreo is expected to launch with the sale of 66,000 toothbrushes and over 50% of these purchases will come from customers who otherwise would have purchased an Oral-B high-end toothbrush. A true and correct copy of this report is attached as Exhibit P.

24. Early reports from the marketplace – even though Ultreo is in limited release – confirm that consumers are purchasing the toothbrush based on claims made by Ultreo in its advertising. For example, current reviews for the Ultreo Ultrasound toothbrush on Amazon.com state:

- “I have been using Electric tooth brushes for 22 years, and try every new one on market. This one cleans your teeth, and gums without touching them. Your teeth feel clean and your gums get over soreness, from plaque and irritation from brushes. The ‘ultrasonic waveguide’ does most of the work, and not the small brushes on the head. It is supposed to even whiten your teeth more effectively than other brushes. It is an improvement over Sonicare Elite on Gum care. The round OralB brushes are mostly effective on polishing teeth rather than good gum care.”
- “I’ve been using electric toothbrushes for several years and tried the Ultreo on advice of my dentist because I tend to have a lot of plaque buildup. It takes a little getting used to, but . . . - it really gets rid of the plaque.”

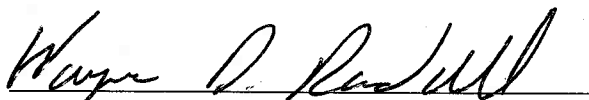
A true and correct copy of the recommendations for Ultreo from Amazon.com are attached as Exhibit Q.

25. It is reasonable to conclude that dental professionals will believe that Ultreo’s claims that the ultrasound component of its toothbrush provides a cleaning benefit. Dental professionals will likely be drawn to Ultreo’s claims regarding ultrasonic technology and are inclined to embrace it since they associate it with superior cleaning in connection with their own tools.

26. It is generally recognized that recommendations from dental professionals will translate into consumer success of an oral care product. Consequently, if dental professionals and consumers are deceived into believing that these claims are true, they will be influenced to recommend and purchase the Ultreo toothbrush. Indeed, consumers are selecting Ultreo at the recommendation of their dental professionals, as Ultreo hoped they would.

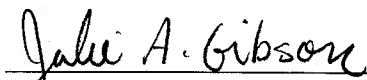
27. Ultreo's marketing strategy and the claims it makes about the performance of the toothbrush are key to its success in the market. In fact, even with limited release, Ultreo is already succeeding. In a press release issued by Ultreo on the day the complaint in this case was filed, Ultreo stated "In a recent study, eight out of 10 consumers who used Ultreo said they would switch to Ultreo from their current power toothbrush." A true and correct copy of this press release as found on Business Wire on September 27, 2007 is attached as Exhibit R.

28. The volume of Oral-B premium power toothbrush sales is the highest in the months of October, November and December. Given the cleaning effectiveness of premium power toothbrushes and their higher price, these products are often given as gifts during the holiday time period. Indeed, the October-December quarter accounts for 40% of Oral-B premium power toothbrush dollar sales in the market, which is about twice the volume of sales done in any other quarter of the year.


Wayne Randall

Sworn to before me this

18 day of October, 2007


Notary Public



JULIE A. GIBSON
Attorney At Law
Notary Public, State of Ohio
My commission has no expiration date
Sec. 147.03 R.C.

CERTIFICATE OF SERVICE

The foregoing AFFIDAVIT OF WAYNE RANDALL IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION was served on all counsel of record on October 26, 2007 by electronic mail through the Court's CM/ECF system.

/s/ *Laura W. Sawyer*